2001

Checkrite Recovery Services v. Deborah M. King : Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CHECKRITE RECOVERY SERVICES, APPELLANT, VS. DEBORAH M. KING, APPELLEE.	)))))))))	CASE NO. 20010006-SC APPELLANT'S REPLY BRIEF PRIORITY NO. 15

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C. DOUGLAS McCALLON
ATTORNEYS FOR APPELLANT

IN THE SUPREME COURT OF THE STATE OF UTAH

CHECKRITE RECOVERY SERVICES,	)	CASE NO. 20010006-SC
	)	
APPELLANT,	)	
	)	
VS.	)	APPELLANT'S REPLY
	)	BRIEF
DEBORAH M. KING,	)	
	)	PRIORITY NO. 15
APPELLEE.	)	

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. THE ISSUE IN THIS CASE IS THE MEANING OF "ALL COSTS OF COLLECTION."

In its Brief, the Amicus has attempted to redefine the issue in this case. In this Court's letter to the Amicus[1], this Court itself defined the issue as "what is the meaning of 'all costs of collection'" as used in U.C.A. 7-15-1(7)(b)(iii).

For the Amicus to attempt to frame this matter as one of abuse of discretion is at best off point, and at worst an attempt to mislead the Court and fog the issues to provide a cover for the Appellee where none exists. Checkrite will address the issue of abuse of discretion later in this Reply Brief, but from the outset Checkrite states that the issue is what this Court said it is.

The Amicus cites *Stevenett v. Wal-Mart Stores, Inc.*, 1999 Utah App. 80, 977 P.2d 508) as its case in chief. The Amicus cites only a portion of the relevant language in its brief. In somewhat misleading terms, on page 2, in the last sentence, the Amicus quotes "the allowance or disallowance of a particular item as a cost falls withing the sound discretion of the trial court." (citations omitted.) Amicus does not recite the entire sentence. The full sentence, which puts the holding and relevance of *Stevenett* in a different light, states that "*When no statute governs a*

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[1] A copy of the Court's letter is attached as Addendum "A".

particular item of expense, the allowance or disallowance of a particular item as a cost falls within the sound discretion of the trial court." *Stevenett*, at 516. (emphasis added). The language addressing a governing statute is key to this matter, as what is at issue is the definition of specific statutory terms. The "particular items" in *Stevenett* were allowed as far as they were provided for by statute or rule. *Stevenett* is a personal injury case, and the issue is one of whether mediation expenses are distinguished from litigation expenses, and therefore taxable as costs. They are not. 977 P.2d at 517. *Stevenett* also discusses statutory costs and costs under Rule 54(d)(1), U.R.C.P.

Rule 54, U.R.C.P., provides the framework for awarding costs in a judgment. Rule 54(d)(1) and (2) state that when a statute expressly provides for payment of costs, as U.C.A. 7-15-1 provides, they are awardable, and provide the formalities for putting those costs before the Court.

In the instant matter, it is clear that particular costs of collection are specifically allowed under the relevant statute. What is at issue is the interpretation of " all costs of collection", not whether those costs are allowable. Statutory interpretation is not discretionary; it is a matter of law.[2] The statute which is at

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[2] See, e.g., *Graham v. Davis County Solid Waste Management and Energy Recovery Special Service District*, 1999 UT App. 136, 979 P.2d 363; *Jeffs v. Stubbs*, 970 P.2d 1234, 351 Utah Adv. Rep. 3 (Utah 1998); *Rehn v. Rehn*, 1999

issue in this appeal specifically allows "all costs of collection." *Tholen v. Sandy City,* 849 P.2d 592 at 595, (Utah Ct. App 1993), footnote 2.

In *Stevenett* and the other cases cited by the Amicus, costs are clearly allowable if the relevant statute provides for the payment thereof. What is being sought here are not litigation costs, (that is, witness' costs, court costs and attorney's fees), which are allowable at any rate under statute, but Checkrite's actual costs of collection, the definition of which is the issue in this matter before the court.

II DESPITE AMICUS' ARGUMENT TO THE CONTRARY, *THOLEN V. SANDY CITY* IS ON POINT AND IS DISPOSITIVE.[3]

The issues between this appeal and *Tholen* are different, but the relevance of *Tholen* is the discussion by the Court of Appeals, in particular, the language in which the Court of Appeals demonstrates that costs of collection in a debt collection context are different from costs of collection in litigation. The Court of Appeals used the example of the Utah Bad Check law to show that the legislature

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UT App. 41, 974 P. 2d 306; *Child v. Newsome*, 892 P.2d 9, 10, (Utah 1995).

[3] Checkrite notes and apologizes to the Court for the misspelling of *Tholen* in it's Brief. Checkrite repeatedly spelled *Tholen* as *Thoren*, and recognizes the error. However, all the citations to *Tholen* are correct, and Checkrite's spelling error in no way changes the applicability of that case to the instant case.

has a different meaning in mind for bad check collections than for routine civil litigation.

> ". . . Moreover, attorney fees should not be confused with the more generic term 'costs' because without specific statutory language, costs do not include attorney fees. This is especially true in light of other instances where the Utah Legislature has expressly authorized the award of attorney fees, sometime explicitly distinguishing fees from costs." (Citations omitted.) See e.g., Utah Code Ann. § 7-15-1(3)(c) (Supp. 1992) (person issuing bad check is liable for "all costs of collection, including all court costs and reasonable attorneys fee." *Tholen*, at 596.

Checkrite refers the Court to Appellant's Brief, pages 14-15 for a more thorough discussion.

Tholen deals with the allowance of attorney's fees. To distinguish this matter, and to further show the relevance of *Tholen*, Checkrite points out that in U.C.A. 7-15-1, *et seq.*, attorney's fees are specifically allowed. The issue in this appeal is whether the language of the statute limits recoverable costs to only court costs and attorney's fees. Again, it is Checkrite's position that the statutory language at issue is not language of limitation or exclusion, but one of a broader inclusion. This position is the same position that the Court of Appeals took in *Tholen*. Checkrite again refers the Court to Appellant's Brief, pages 14-20 for a more complete discussion.

III. THIS COURT SHOULD NOT PERMIT THE AMICUS TO REDEFINE THE ISSUE.

Amicus' argument that the only issue properly before the Court is abuse of discretion is not correct. To begin with, this case is an appeal from a final order and judgment of a District Court, and is therefore appealable under Rules 3 and 4 of the Utah Rules of Appellate Procedure, Title II.[4] The entire hearing before the District Court was on an objection to the Clerks' denial of a Certificate of Default. While abuse of discretion is an issue that this Court may wish to address, it is not the issue here. It is Checkrite's position that there was no discretion to abuse; rather, that the costs sought by Checkrite are mandatory in nature, and that Judge Fratto erred as a matter of law, not of discretion. Again, statutory interpretation is a question of law, and questions of law are reviewed without deference to the trial court. *Graham v. Davis County Solid Waste Management and Energy Recovery Special Service District*, 1999 UT App. 136, 979 P.2d 363.

IV. AMICUS'S ARGUMENT THAT THE PARTIES COULD CONTRACT FOR PAYMENT OTHER THAN AS PROVIDED BY STATUTE GOES AGAINST THE INTENT OF U.C.A. 7-15-1, AND PROMOTES BAD PUBLIC POLICY.

Utah law specifically prevents anyone other than the holder of a bad check

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[4] A decision on the merits was final for the purposes of appeal. *Taylor v. Hansen,* 958 P.2d 923 (Utah Ct. App. 1998).

from recovering the damages and penalties under the statute. It is the intent of the legislature that all of the damages go to the holder of the bad check. If the holder has to pay a percentage, or even a flat rate, the holder does not receive the full amount as intended by the statute. The holder would make up the loss by raising prices, which is not good public policy. The statute is also intended to penalize the maker of the check by requiring that the make pay "all costs of collection", not the holder, not the attorney, not the court. That is why those items are specifically taxed against the maker. To do otherwise is to reduce the obligation and penalty against the maker, and is again bad public policy.

Without a judgment, Checkrite cannot recover, the merchant cannot recover, and the maker walks away. The purpose of the statute is to make the bad actor pay, not the public.

Historically, prior to the enactment in 1999 of the present statute, it has not been the practice of merchants or check collectors in Utah to contract as the Amicus suggests. The practice has been that the collector, as authorized by statute, recovers its costs of collection from the maker of the bad check. Any other practice is bad public policy, as the costs otherwise will be borne out in increased prices to the consumer.

V. The issue in this case is not abuse of discretion, as the Amicus asserts.

As the Amicus has raised the issue of abuse of discretion specifically, Checkrite will address and dispose of it here. Despite the efforts of the Amicus to cloud and re-define the issues, the issue in this case is not abuse of discretion, rather it is one of failure to follow the clear language of the statute, which language make the awarding of "all costs of collection" mandatory and not discretionary. Judge Fratto did not have the discretion to disallow Checkrite's costs, and the District Court Judges in their collective authority did not have the authority to re-write the statute. This is not a matter of abuse of discretion, rather, it is a matter of usurpation of legislative prerogative. What remains before this Court is the issue the Court itself has framed, and which the Court of Appeals has answered in *Tholen v. Sandy City*;

> What is the meaning of "all costs of collection" under Utah's Bad Check Law? "While we recognize that in the context of promissory notes, 'costs of collection,' as a term of art, can be taken to include attorney fees without expressly so stating, see Black's Law Dictionary 312 (5th ed. 1979), such an interpretation is inapplicable in the context of statutory interpretation in Utah, especially in light of Section 7-15-1(3), which demonstrates the Legislature does not have that understanding." *Tholen*, at 596, footnote 5.

CONCLUSION

The issue in this matter is the definition of "all costs of collection", not abuse of discretion. The cases cited by the Amicus support Checkrite's position that where specific costs are authorized by U.C.A. 7-15-1, *et seq*, those costs should be awarded. The ruling by Judge Fratto based upon a memorandum from a limited number of District Judges was wrong as a matter of law, and should be reversed and remanded.

Wherefore, Checkrite respectfully requests that the Court remand the matter to the District Court with instructions to allow the recovery of the collection costs of $20.07 per check as provided by statute.

Respectfully Submitted;

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March 27, 2001

The Honorable Mark Shurtleff
Attorney General State of Utah
Capitol Building, 2nd Floor
Salt Lake City, Utah 84114

Dear Mr. Shurtleff:

The court has requested that I write you and invite your Consumer Division of the Utah Attorney General's Office to file an amicus curiae brief in support of the defendant, Deborah M. King, who is appearing pro se in a case before the Supreme Court, entitled CheckRite Recovery Services v. King, Case No. 20010006-SC . The issue in the case is what costs are allowed as "collection costs" under section 7-15-1(7)(b)(iii) Utah Code Ann.

On January 10, 2000, six judges of the district court signed a policy memorandum directing that in the Murray, Sandy, and West Valley City Departments of the Third District Court default judgments under section 7-15-1, would include only the amount of the checks, interest, damages, costs of court, and attorney fees. Costs of collection would not be awarded in addition.

Because defendant King is representing herself, the court wants to be sure that the issue is fully briefed and argued on both sides.

The court will appreciate your considering this request and advising me whether you can participate.

Respectfully,

Pat H. Bartholomew
Clerk of Court

cc: Deborah M. King
Doug McCallon, Esq.